

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2010 MSPB 236**

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Docket No. CH-0752-09-0620-I-1

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**Deidra R. Minor,  
Appellant,**

**v.**

**United States Postal Service,  
Agency.**

December 7, 2010

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Hayes P. Haddox, Esquire, Louisville, Kentucky, for the appellant.

Joseph E. McCann, Esquire, Philadelphia, Pennsylvania, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, Member

**OPINION AND ORDER**

¶1 The agency has filed a petition for review of the December 28, 2009 initial decision, which found that it failed to prove its two charges against the appellant, and, accordingly, reversed her removal. For the reasons discussed below, we GRANT the agency's petition for review as to Charge 1, DENY the agency's petition for review as to Charge 2, and REMAND the appeal to the agency to determine a new penalty.

### BACKGROUND

¶2 The appellant is an EAS-17 Supervisor, Distribution Operations (SDO). Initial Appeal File (IAF), Tab 5 at 14. On July 6, 2008, she notified Acting Manager, Distribution Operations (MDO) Jesse Parker that she had injured herself on June 17, 2008, when she stepped on an uneven floor surface and twisted her left knee. She also filed a workers' compensation claim. *Id.* at 51-52, 76-79, 84-87. On July 23, 2008, MDO Kenneth Ford contacted the agency's Office of Inspector General (OIG) to investigate the incident because he suspected that the appellant's knee problem was pre-existing and that she was claiming an on-the-job injury only because she had no leave to cover her time off for surgery on the knee, which she had scheduled, and for convalescing from the surgery. He indicated that the appellant had surgery on her right knee in February 2008; that before then, she told him that she would also have to have surgery on her left knee; and that she ran out of leave after her first surgery. *Id.* at 43, 54.

¶3 Special Agent (SA) Kevin Aberle and Reporting Agent and Workers' Compensation Analyst Jim Cupp investigated the incident, receiving information from the following: the appellant; MDOs Parker and Ford; the appellant's co-workers, SDOs Brenda Martin, Barron Purifoy, and Bob Newsome; and the appellant's doctor, orthopedic surgeon Zack Stearns. Based on the information, the investigators determined that the appellant had submitted a false claim for an on-the-job knee injury that was a pre-existing condition and had made materially false statements to an OIG SA in writing and under oath. IAF, Tab 5 at 43-46. The Report of Investigation (ROI) was submitted, inter alia, to the United States Attorney for possible criminal prosecution.<sup>1</sup> *Id.* at 44, 47. The appellant was subsequently indicted and arrested.<sup>2</sup> *Id.* at 30-32.

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<sup>1</sup> A more legible copy of the ROI is at IAF, Tab 24.

<sup>2</sup> The original indictment was later changed. IAF, Tab 10, Ex. 4.

¶4 On January 10, 2009, Ford proposed to remove the appellant based on two charges: 1. Failure to Follow Instructions; and 2. Improper Conduct. Under Charge 1, Ford specified that the appellant failed to immediately report her accident/injury to agency management. Under Charge 2, Ford specified that the appellant attempted to receive pay and medical benefits to which she was not entitled by submitting a false claim of a work-related injury and that she knowingly provided false statements during an official investigation. IAF, Tab 5 at 21-24. On April 24, 2009, the United States District Court for the Western District of Kentucky issued an order dismissing the indictment. The order stated that the court heard Dr. Stearns's testimony the previous day, before the trial commenced, and, based on that testimony, the United States moved to dismiss the indictment. *Id.* at 20. Also on April 24, 2009, Senior MDO Mark Hulme issued a decision sustaining the charges and removing the appellant. *Id.* at 15-17. The appellant's removal was effective May 2, 2009. *Id.* at 17. The appellant then filed an appeal of her removal. IAF, Tab 1.

¶5 In his December 28, 2009 initial decision, the administrative judge found that the agency stipulated that Charge 2 was limited to the specification that the appellant filed a false claim for workers' compensation benefits based on a June 17, 2008 on-the-job injury to her left knee, withdrawing the specification that the appellant provided false statements during an investigation. He stated that the agency generally maintained that the medical condition causing the appellant's left knee pain, which led to her July 31, 2008 surgery, existed before her alleged on-the-job injury. Initial Decision (ID) at 3. After reviewing the evidence and the testimony, the administrative judge found that the agency's charges were not sustained by a preponderance of relevant, probative, or credible testimony or evidence of record. *Id.* at 4-43. Accordingly, he reversed the appellant's removal. *Id.* at 43.

¶6 The agency has filed a petition for review. Petition For Review (PFR) File, Tab 1. The appellant has filed a response opposing the petition for review. *Id.*, Tab 3.

### ANALYSIS

#### The administrative judge erred in not sustaining Charge 1.

¶7 The agency argues that the administrative judge erred in analyzing Charge 1, and, therefore, in not sustaining it. The agency contends that it charged the appellant with failing to comply with instructions in its Handbook EL-814, “Postal Employee’s Guide to Safety,” to immediately report her alleged work-related injury to her supervisor. It asserts that the administrative judge initially correctly described the charge, but then veered off into analyzing whether the appellant failed to comply with the statutory deadline for filing a workers’ compensation claim. It argues that the administrative judge thus erred in finding the charge without merit on the basis that the appellant’s 18-day delay in reporting the incident to her supervisor was within the 30-day statutory deadline for filing a workers’ compensation claim. It also argues that the administrative judge erred in importing a non-existent standard into the charge by finding that the appellant exercised “reasonable diligence” in having her physician examine her left knee and having a Magnetic Resonance Imaging (MRI) performed on it before reporting the incident to her supervisor. It contends that Handbook EL-814 contains no provision requiring employees to exercise such “reasonable diligence” in seeing their physicians and having medical procedures such as MRIs; rather, it simply requires employees to report work-related injuries to their supervisors immediately. PFR File, Tab 1 at 7-13.

¶8 We agree with the agency that the administrative judge erred in analyzing Charge 1. As the agency asserts and the administrative judge initially found, it specified under Charge 1 that the appellant failed to timely report her accident/injury as required by the agency’s Handbook, EL-814, “Postal

Employee's Guide to Safety," Section II.A, which states: "If you are injured or become ill from work-related causes, you must report immediately to your supervisor, even if the problem seems minor." IAF, Tab 5 at 21-22, Tab 25; ID at 2.

¶9 The administrative judge then inexplicably stated, however, that to prove the first charge, "the agency must show the appellant's 18-day delay *in filing her OWCP claim* rose to the level of a 'failure to follow instructions,' by failing to timely file her Department of Labor, CA-1, work injury report 'immediately,' within the meaning of it[]s Employee and Labor-Relations Guide [sic]." ID at 3 (emphasis added). The administrative judge concluded:

Moreover, pursuant to [5 U.S.C. § 8122\(b\)](#), in the case of a "latent disability," an employee is provided thirty days from the time she:

[I]s aware, or by the exercise of reasonable diligence should have been aware, that [her] condition is causally related to [her] employment, whether or not there is a compensable disability.

5 U.S.C.A. § 8122(b) (West 2007) (emphasis added). In this case I find the appellant exercised reasonable diligence in having her undisputed swollen left knee examined by Dr. Stearns[] on June 27, 2008, and having an MRI examination on her left knee on June 30, 2008, before reporting the June 17, 2008, incident to Acting Supervisor Parker on July 6, 2008. Even then, it is unlikely she was aware she suffered from a confirmed left-knee torn medial meniscus in light of Dr. Stearns'[s] first mention of this diagnosed condition in his July 31, 2008, post-operative report. In these circumstances, I find the appellant's alleged filing "delay" is well within the statutory time limit for filing an OWCP claim for such "latent" conditions as the appellant's chondromalacia and torn, left-knee, medial meniscus. I, accordingly, find no merit to the agency's first charge the appellant violated instructions by not filing her injury claim on an earlier date.

ID at 42.

¶10 The administrative judge erred in substituting a different specification for the one invoked by the agency in this case. As the administrative judge himself stated, the Board is required to review the agency's decision on an adverse action solely on the grounds invoked by the agency; the Board may not substitute what it

considers to be a more adequate or proper basis. *Gottlieb v. Veterans Administration*, [39 M.S.P.R. 606](#), 609 (1989); ID at 3-4. Although we find that the administrative judge erred, we find it unnecessary to remand this case for further proceedings on Charge 1. As the record is adequately developed, we may analyze the evidence at this level to determine whether the agency proved the charge. *See Greenough v. Department of the Army*, [73 M.S.P.R. 648](#), 654 (1997).

¶11 We further agree with the agency that the administrative judge erred in not sustaining Charge 1. The appellant has not contested that she reported the incident 18 days after it occurred or that she was aware of the requirement to report accidents immediately. IAF, Tab 5 at 21-22, 77; Hearing Disc 8 (38:15-21). The only excuses she presented for her delay were her desires to see if her knee would get better on its own and to wait until her permanent supervisor, Daryl Ayo, returned from vacation. IAF, Tab 5 at 21, Tab 24 at 26. She has presented nothing to show that such excuses entitled her to delay reporting the incident. Therefore, we SUSTAIN Charge 1.

The agency's petition for review fails to provide a basis for reversing the administrative judge's finding that it did not prove Charge 2.

¶12 The agency asserts that the administrative judge erred in not sustaining Charge 2. PFR File, Tab 1 at 13-33. We have fully considered the agency's assertion and acknowledge that the administrative judge made some errors in analyzing the evidence presented concerning the charge. After reviewing the record, however, we conclude that the adjudicatory error did not prejudice the agency's substantive rights or alter the outcome regarding this charge. Thus, the agency's petition for review does not provide a basis for reversing the administrative judge's finding that the agency failed to sustain its burden of proving Charge 2. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984). Therefore, we DENY the agency's petition as it relates to Charge 2.

We remand the case to the agency for a new penalty determination.

¶13 When the Board sustains fewer than all of the agency's charges, and when the agency has indicated, either in its final decision or in proceedings before the Board, that it would have imposed a lesser penalty if not all the charges were sustained, remanding the case to the agency is appropriate. *Laycock v. Department of the Army*, [97 M.S.P.R. 597](#), ¶ 13 (2004). Here, Hulme testified that he would not have decided to remove the appellant based solely on Charge 1. Hearing Disc 6 (49:00-49:09). Thus, we find it appropriate to remand the case.<sup>3</sup> *See Lock v. General Services Administration*, [107 M.S.P.R. 219](#), ¶¶ 1-5 (2007).

### ORDER

¶14 Accordingly, we REMAND this appeal to the agency to select an appropriate penalty in light of the misconduct sustained in this Opinion and Order. The agency must complete its proceedings and issue a new decision within 60 days of the date of this Order. Upon issuance of that decision, if the appellant is dissatisfied, she may file an appeal with the Board's Central Regional Office and, if she so desires, exercise her right to a hearing as to the reasonableness of the newly-imposed penalty, prior to the issuance of a new initial decision addressing solely that issue.

¶15 The Board therefore dismisses this appeal without prejudice to the appellant's right to file an appeal within 30 days of the date of the agency's new penalty determination. Because this decision does not finally decide the penalty issue, the appellant's rights to petition for review of that issue and to seek review

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<sup>3</sup> Because we have remanded this appeal for the agency to determine the appropriate penalty in this case, it is unnecessary for the Board to decide the appellant's argument, below and on review, that, based upon Charge 1 alone, the penalty of removal would be unreasonable because another similarly-situated co-worker in the appellant's chain of command engaged in nearly identical misconduct and received a letter of warning. PFR, Tab 3 at 16; IAF, Tab 27 at 15. However, we expect the agency will fully address this issue on remand. *See Lewis v. Department of Veterans Affairs*, [113 M.S.P.R. 657](#), ¶ 6 (2010).

of the agency's action in the United States Court of Appeals for the Federal Circuit will accrue in connection with the decision now to be issued by the agency, following the administrative judge's action on any renewed appeal that she may bring. *See Lock*, [107 M.S.P.R. 219](#), ¶ 6.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.